

SBA Releases Loan Forgiveness Application, Provides Guidance for Forgiveness

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INTRODUCTION

After Congress's adoption of the Coronavirus Aid, Relief and Economic Security ("CARES") Act, including the Payroll Protection Program ("PPP") on March 27, 2020, the Department of the Treasury and the Small Business Administration ("SBA") issued an Interim Final Rule ("Final Rule") that governed the implementation of the CARES Act. Since then, the SBA has supplemented this guidance through additional interim rules and the posting of nearly 50 frequently-asked questions and answers concerning the PPP. The vast majority of this regulatory instruction has concerned the process for applying for and receiving PPP funding. Precious little had been said about the process of loan forgiveness that is outlined in Section 1106 of the CARES Act.

Late on Friday, May 15, 2020, the SBA began outlining the process for obtaining loan forgiveness of PPP loans, when it issued SBA Form 3508, entitled "Paycheck Protection Program Loan Forgiveness Application" ("Forgiveness Application"). The 11-page document sets forth the information and documentation required to obtain loan forgiveness, and begins to answer some (but not all) of the questions raised by the text of the CARES Act.

PPP LOAN FORGIVENESS APPLICATION – FORM 3508

SBA Form 3508 consists of five parts:

- a two-page general instructions for borrowers, including instructions for the PPP loan forgiveness calculation form;
- the PPP loan forgiveness calculation form ("Forgiveness Calculation");
- PPP Schedule A, including instructions;
- PPP schedule A Worksheet, including instructions; and
- the (optional) PPP borrower demographic information form.

While the Forgiveness Application identifies the Forgiveness Calculation and the Schedule A as the two documents that a borrower must submit to its lender to obtain loan forgiveness, in truth, a borrower will need to submit substantial additional documentation concerning payroll costs, nonpayroll costs, and employment statistics as part of the forgiveness package. In addition, a borrower must retain other documentation, including documentation concerning borrowers' eligibility, for six years after repayment or forgiveness of the PPP loan.

GUIDANCE PROVIDED IN LOAN FORGIVENESS APPLICATION

1. **Modification of “Covered Period”:** Section 1106 of the CARES Act provides for forgiveness of PPP indebtedness in an amount equal to certain “costs incurred and payments made during the covered period...,” and defines “covered period” as “the 8-week period beginning on the date of the origination of a covered loan.” The Forgiveness Application echoes that definition, stating that the eight week (56-day) “Covered Period” begins on the disbursement date of the loan.

Recognizing, however, that many borrowers may receive loan disbursement in the midst of a payroll period, the Forgiveness Application permits a borrower to adopt an alternative covered period. “Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that begins on the first day of their first pay period following their PPP Loan Disbursement Date (the ‘Alternative Payroll Covered Period’).” In general, a borrower who elects to use the Alternative Payroll Covered Period must apply it for all payroll-related calculations for the Forgiveness Application and use the “Covered Period” only for nonpayroll-related cost calculations. The Forgiveness Application provides an illustration: A Borrower receives its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its loan disbursement is Sunday, April 26. In that circumstance, the first day of the Alternative Payroll Covered Period is Sunday, April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20.

2. **Owner/Proprietor Payroll Costs:** The Calculation Form, which includes various certifications, requires the borrower to certify that the dollar amount for which forgiveness is being requested does not exceed eight weeks’ worth of 2019 compensation for any owner-employer or self-employed individual/general partner, capped at \$15,385 per individual.
3. **Eligible Noncash Payroll Costs:** Noncash payroll contributions eligible for loan forgiveness include (a) employer contributions for employee health insurance (including employer contributions to a self-insured, employer-sponsored group health plan), (b) employer contributions to employee retirement plans, and (c) state and local unemployment insurance tax.
4. **Eligible Nonpayroll Costs:** Both the CARES Act and Final Rule left some question as to the scope of nonpayroll costs that would be eligible for forgiveness. The Forgiveness Application provides greater clarity. Forgivable expenses include:
 - a. payments of interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020;
 - b. business rent or lease payments pursuant to lease agreements *for real or personal property* in force before February 15, 2020; and
 - c. business payments for the service and distribution of electricity, gas, water, transportation, telephone, or internet access, which service began before February 15, 2020.

Neither the Act nor the Final Rule clearly indicate which “rent obligations” would be eligible for forgiveness. The Forgiveness Application makes clear that rental payments for both real *and* personal property (such as vehicles and equipment) may be included for loan forgiveness.

5. **Payroll Reduction Under §1106(d):** While the CARES Act, generally, calculates forgiveness of PPP loans based on certain eligible expenditures set forth in §1106(b), it reduces the amount of forgiveness based upon reduction of staff and reduction of salary. The Forgiveness Application clarifies how the SBA will consider those factors.
- a. Reduction in Number of Employees: Under §1106(d)(2), forgiveness of a PPP loan is to be reduced in proportion to the amount by which a borrower reduced employment during the covered period as compared to the chosen “reference period” (generally either February 15, 2019 to June 30, 2019, or January 1, 2020, to February 29, 2020). The actual loan forgiveness that the borrower will receive may be reduced if the borrower’s average number of full-time equivalency (FTE) employees during the covered period is less than the number of FTE employees during the borrower’s chosen reference period. For purposes of calculating FTE, the Forgiveness Application requires the borrower to enter the average number of hours paid per week to each employee, divided by 40, and round the total to the nearest tenth. The maximum FTE for each employee is capped at 1.0.
 - i. FTE Reduction Safe Harbor: Notwithstanding the above, a borrower is exempt from the reduction in loan forgiveness based on FTE employees if (a) the borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; *and* (2) the borrower then restored its FTE employee levels to the February 15, 2020 level, by no later than June 30, 2020.
 - ii. FTE Reduction Exceptions: Loan forgiveness will not be reduced by FTE reductions with respect to (1) any positions for which the Borrower made a good-faith, written offer to rehire an employee during the covered period that was rejected by the employee; and (2) any employees who, during the covered period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.
 - b. Reduction Relating to Salary and Wages: Section 1106(d)(4) provides for reduction in loan forgiveness based upon the reduction in employee wage compensation. The Act provides a proportionate reduction in loan forgiveness calculated by the amount of any reduction in total salary or wages for any employee that is in excess of 25 percent of the total salary or the total salary or wages that employee received during the full quarter prior to the covered period. The problem with the statutory language, however, is it compares the salary and wages paid to an employee during the eight-week “covered period” with the amount paid during the thirteen-week “full quarter during which the employee was employed before the covered period.” The PPP Schedule A clarifies that a borrower is to compare an employee’s average *annual* salary or hourly wage during the relevant periods, and not the cumulative payment of salary and wages during the two periods.
6. **Documentation and Processing:** Page 10 of the Forgiveness Application identifies the documentation that must be submitted by the borrower to its lender along with the Forgiveness Calculation and PPP Schedule A. In addition to documentation justifying the employee retention calculations, a borrower must provide:

- a. For Payroll Costs:
 - i. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
 - ii. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period; and
 - iii. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.

- b. For Nonpayroll Costs:
 - i. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
 - ii. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
 - iii. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.

The Forgiveness Application identifies additional information and documents that a borrower must maintain (but not submit to the lender) for at least six years. These include certain documents related to the PPP Schedule A and Schedule A Worksheet, as well as documentation related to the PPP loan request and initial certification of eligibility.

Finally, neither the statute nor Final Rule states by when a borrower must apply for loan forgiveness under the CARES Act. Yet, the upper right-hand corner of the Forgiveness Application lists an “Expiration Date” of October 31, 2020. While it is possible that this “Expiration Date” may be extended, a borrower would be well-advised to submit its Forgiveness Application and accompanying documents before then.

SBA Form 3508: <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>

PPP Loan Frequently-Asked Questions:

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

If you have questions about SBA PPP Loan Forgiveness, please contact your Lawrence Kamin attorney.

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